



Signed: April 02, 2010

EDWARD D. JELLEN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

Case No. 05-40908 EDJ  
Adv. No. 05-04255 AJ

GORDON CHARLES MOORE and  
BETTY ANN MOORE,

Debtors. /

DICK PAUL,

Plaintiff,

vs.

GORDON CHARLES MOORE and  
BETTY ANN MOORE,

Defendants. /

MEMORANDUM

Plaintiff Dick Paul ("Paul") has moved for reconsideration of this court's order filed February 25, 2010 denying Paul's motion to reopen this adversary proceeding and to set aside a settlement agreement between Paul and debtors Gordon and Betty Moore (the "debtors"). The court will deny the motion.

A. Background

On May 13, 2005, Paul filed an adversary complaint herein  
Memorandum

1 seeking a nondischargeable judgment against the above debtors  
2 grounded on fraud. Bankruptcy Code § 523(a)(2). Thereafter, the  
3 parties advised the court that they had settled the matter.  
4 However, the parties did not file any formal documents to conclude  
5 the adversary proceeding, such as a dismissal or a request for entry  
6 of a stipulated judgment. Accordingly, on August 29, 2006, this  
7 court entered its Dismissal With Stay (the "Dismissal Order")  
8 dismissing the adversary proceeding. The Dismissal Order provided  
9 that it was stayed for 10 days to allow either party to seek relief  
10 from the dismissal.

11 On September 8, 2006, Paul filed a timely motion seeking relief  
12 from the dismissal. The motion alleged that, although the parties  
13 had settled the matter, Paul's counsel was of the view that the  
14 debtors had fraudulently induced Paul to enter into the settlement  
15 because they had failed to make the payments required thereunder.  
16 Paul set the motion for hearing, but then removed the matter from  
17 calendar. Thus, the Dismissal Order became final.

18 Over three years passed. Then, on November 10, 2009, Paul  
19 filed a motion to reopen this adversary proceeding and to set aside  
20 the Dismissal Order (hereafter, the "2009 Motion"). Unlike the  
21 motion for relief from the settlement agreement that Paul filed in  
22 2006, the 2009 Motion did not allege the debtor's fraud in the  
23 inducement of the settlement agreement. (Indeed, neither the word  
24 "fraud" nor the word "misrepresentation" appeared in any of Paul's  
25 moving papers for the 2009 Motion.) Rather, the 2009 Motion alleged  
26 that Paul's obligation to dismiss the complaint was conditioned on

1 the debtors' performance under the settlement, that the debtors did  
2 not perform, and therefore, that the court should set aside the  
3 Dismissal Order.

4 Following oral argument, the court advised the parties that it  
5 would deny the 2009 Motion, citing case law to the effect that the  
6 court lacked jurisdiction over actions to enforce or set aside the  
7 settlement agreement because the court had not reserved any  
8 jurisdiction, and because both the adversary proceeding and the main  
9 bankruptcy case had been closed. The cases cited by the court were  
10 Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375 (1994), In re  
11 Hunter, 66 F.3d 1002 (9th Cir. 1995), and Valdez Fisheries Devel.  
12 Assoc. v. Seahawk Seafoods, Inc., 439 F.3d 545 (9th Cir. 2006). On  
13 February 25, 2010, the court entered its order denying the 2009  
14 Motion. Paul's present motion for reconsideration followed.

15 Paul's motion for reconsideration, unlike the 2009 Motion,  
16 alleges that the debtors induced Paul to enter into the settlement  
17 agreement by fraud, and that the court should set aside the  
18 Dismissal Order and settlement agreement on that ground. Paul  
19 apparently concedes that any request for relief grounded on the  
20 debtors' fraud and Fed. R. Civ. P. 60(b)(3)<sup>1</sup> (relief from a final  
21 judgment based on "fraud, misrepresentation, or misconduct by an  
22 opposing party") would not be timely. This is so because motions  
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24 <sup>1</sup>Subject to several exceptions not applicable here, Fed. R.  
25 Civ. P. 60 applies in adversary proceedings via Fed. R. Bankr. P.  
26 9024. All further references herein to Fed. R. Civ. P. 60 are to  
Fed. R. Civ. P. 60 via Fed. R. Bankr. P. 9024.

1 under Fed. R. Civ. P. 60(b)(3) must be filed within one year of  
2 entry of the final judgment at issue. Fed. R. Civ. P. 60(c)(1). In  
3 support of the motion for reconsideration, then, Paul cites Fed. R.  
4 Civ. P. 60(b)(6), which authorizes a court to relieve a party from a  
5 final judgement "for any reason justifying relief from the operation  
6 of the judgment."

7 B. Discussion

8 The court will deny Paul's motion for reconsideration for two  
9 basic reasons. First, Paul's request from relief from the Dismissal  
10 Order was not timely. Fed. R. Civ. P. 60(c)(1) provides that  
11 motions for relief grounded on Fed. R. Civ. P. 60(b)(6) "must be  
12 made within a reasonable time."

13 Here, Paul did not act within a reasonable time. Over three  
14 years have passed since the Dismissal Order became final. As early  
15 as September 8, 2006, Paul alleged in this court that debtors  
16 fraudulently induced him to enter into the settlement agreement, and  
17 Paul elected at that time not to pursue the matter. Thus, Paul has  
18 been on notice of any fraud in the inducement for over three years  
19 before he filed the current motion seeking relief from the Dismissal  
20 Order.<sup>2</sup> Moreover, counsel for the debtors states that he is unable

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22 <sup>2</sup>The court also notes that under California law, actions  
23 grounded on fraud must be commenced within three years of  
24 discovery of facts constituting the fraud. Cal. Civ. Proc. Code  
25 § 338(d). Here, Paul claims in his motion for reconsideration  
26 that, at some unstated point during the three years following  
evidence to corroborate his contention that debtors fraudulently  
(continued...)

1 to locate debtor Charles Moore, and that unfair prejudice would  
2 therefore result if the court were to grant Paul relief from the  
3 settlement agreement or Dismissal Order.

4 The court holds that Paul's motion grounded on Fed. R. Civ. P.  
5 60(b)(6) seeking relief from the Dismissal Order was not timely,  
6 Fed. R. Civ. P. 60(c)(1), and must therefore be denied.

7 Secondly, to the extent that Paul seeks to set aside the  
8 settlement agreement, in this court, on the grounds of the debtor's  
9 fraud in the inducement, this court lacks subject matter  
10 jurisdiction under the rationale of Kokkonen, Hunter, and Valdez  
11 Fisheries. The court did not reserve jurisdiction, and no other  
12 basis for bankruptcy court jurisdiction exists under 28 U.S.C.  
13 § 1334(a) and (b).

14 In so holding, the court notes, in conformity with the Ninth  
15 Circuit's ruling in Hunter, 66 F.3d at 1006, that its decision is  
16 not intended as a ruling on the merits of Paul's contention that the  
17 settlement agreement may be set aside on the grounds of the debtors'  
18 fraud. In Hunter, the Ninth Circuit held that the Bankruptcy  
19 Appellate Panel erred in affirming the bankruptcy court's decision  
20 to dismiss, on the merits, a creditor's independent action to set  
21 aside a satisfaction of judgment on the grounds of the debtor's  
22 alleged fraud. The error arose, opined the Hunter court, because

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24 <sup>2</sup>(...continued)  
25 induced him to enter into the settlement agreement. Even if so,  
26 Paul was clearly on notice of any fraud on debtors' part in the  
inducement of the settlement agreement no later than September 8,  
2006, when Paul filed a motion herein so alleging.

1 Fed. R. Civ. P. 60 does not bar a party from obtaining relief from  
2 the effect of a final judgment by independent action, Fed. R. Civ.  
3 P. 60(d)(1), and because the bankruptcy court lacked subject matter  
4 jurisdiction over any such independent action.

5 Citing the Hunter case, Paul argues that this court may have  
6 subject matter jurisdiction if the debtors' conduct in connection  
7 with the Dismissal Order could be considered a "fraud on the court."  
8 See also Fed. R. Civ. P. 60(d)(3). This argument fails, however,  
9 because there was no fraud on the court here.<sup>3</sup> No fraud aimed at  
10 the court is alleged. Moreover, the only representation made to the  
11 court in connection with the Dismissal Order was that the parties  
12 had settled the matter. This representation was made by both  
13 parties, and was, in fact, true.

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17 <sup>3</sup>The Ninth Circuit has adopted the following definition of  
18 "fraud on the court:"

19 "Fraud upon the court" ... embrace[s] only that species  
20 of fraud which does or attempts to, defile the court  
21 itself, or is a fraud perpetrated by officers of the  
22 court so that the judicial machinery can not perform in  
23 the usual manner its impartial task of adjudging cases  
24 that are presented for  
25 adjudication.

23 Appling v. State Farm Mut. Auto. Ins. Co., 340 F.3d 769, 780  
24 (9th Cir. 2003) (internal citations omitted). In Appling, the  
25 Ninth Circuit stated in this regard that a fraud on the court  
26 requires a 'grave miscarriage of justice' . . . and a fraud that  
is aimed at the court. Id. (Internal citation omitted.)

1 C. Conclusion

2 Paul is not entitled to relief from the Dismissal Order  
3 grounded on Fed. R. Civ. P. 60, and the court lacks subject matter  
4 jurisdiction to hear any suit to set aside or enforce the settlement  
5 agreement at issue. The court will issue its order so providing.

6 \*\* END OF MEMORANDUM \*\*  
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Memorandum

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